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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

B5-

DATE:

SEP 24 2012

OFFICE: NEBRASKA SERVICE CENTER

FILE:

IN RE:

Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was recommended for approval by the Director, Nebraska Service Center (Director), who also certified the case for review to the Chief, Administrative Appeals Office (AAO). The AAO will withdraw the Director's decision, and deny the petition.

The petitioner is a health care business. It seeks to permanently employ the beneficiary in the United States as a speech language pathologist pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). This section of the Act provides for immigrant classification to members of the professions holding advanced degrees whose services are sought by employers in the United States. The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as follows:

Advanced degree means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

Case history

The petitioner filed its Form I-140, Immigrant Petition for Alien Worker, on January 6, 2011. As required by statute, the petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which was filed at the Department of Labor (DOL) on March 8, 2010 (the priority date of the instant petition), and certified by the DOL on July 12, 2010. The ETA Form 9089 specifies that the minimum education required for the proffered position is a master's degree in audiology and speech language pathology, or a foreign educational equivalent.

The Director issued a decision recommending approval of the petition on January 12, 2012. In his decision the Director reviewed the documentation in the record – which shows that the beneficiary has (a) a three-year bachelor of science degree in speech and hearing from [REDACTED] (b) a two-year master of science degree in audiology and speech language pathology from the same university, and (c) a speech-language pathologist license from the [REDACTED]

[REDACTED] The Director observed that the [REDACTED] is a nine-member board, operating under the umbrella of California's Department of Consumer Affairs, which sets licensing standards and enforces state laws governing the practice of speech-language pathology and audiology. The Director also noted that state regulations require an applicant to have a master's degree in speech-language pathology or audiology from an [REDACTED]-approved educational institution, or equivalent qualifications, to be eligible for a license in [REDACTED]. In issuing the beneficiary a license, therefore, the Director concluded that the [REDACTED] judged her Indian education to be equivalent to a (U.S.) master's degree. While stating that U.S. Citizenship and Immigration Services (USCIS) is not bound by the decision of a state agency in California, the Director indicated that he found the [REDACTED] licensing action persuasive in this case and determined that the

beneficiary's education is equivalent to a U.S. master's degree in audiology and speech-language pathology.

Simultaneously with the recommended approval of the petition, the Director certified the decision for review to the AAO. Certifications by field office or service center directors may be made to the AAO "when a case involves an unusually complex or novel issue of law or fact." 8 C.F.R. § 103.4(a)(1).

After reviewing the entire record, the AAO issued a Notice of Intent to Deny and Request for Evidence (NOID/RFE) on April 26, 2012. The AAO stated that it intended to withdraw the Director's recommended approval of the petition because the beneficiary did not appear to have the foreign equivalent of a U.S. master's degree, as required by the labor certification. The AAO noted that the Director's decision referred to the Educational Database for Global Education (EDGE), created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO), and a specific entry therein which indicated that the beneficiary's three-year bachelor of science degree in India would be comparable to three years of study at a U.S. college or university. The Director's decision then stated, erroneously, that EDGE provided no information about the beneficiary's master's level program. In fact, EDGE does contain an entry about two-year Master of Science degrees (following three-year bachelor's degrees) in India, indicating that they are comparable to bachelor of science degrees in the United States. The petitioner was asked to reconcile this equivalency rating in EDGE with its own claim in this proceeding that the beneficiary's master of science in audiology and speech language pathology from Bangalore University is equivalent to a U.S. master's degree. The petitioner was also requested to submit additional evidence of its continuing ability to pay the proffered wage from the priority date (March 8, 2010) up to the present. While the petitioner's ability to pay the proffered wage was established for 2010, it was not for 2011. Therefore, the AAO requested copies of the Form W-2, Wage and Tax Statement, issued to the beneficiary for 2011, as well as the petitioner's federal income tax return or audited financial statement for 2011.

The petitioner responded to the NOID/RFE on May 31, 2012, with a brief and additional documentation addressing the issue of the U.S. equivalency of the beneficiary's Indian education. The petitioner neglected to submit the requested evidence of its ability to pay the proffered wage in 2011.

The issues before the AAO, therefore, are the following:

- Does the beneficiary have the requisite educational degree to be eligible for classification as an advanced degree professional under section 203(b)(2) of the Act?
- Does the beneficiary have the requisite educational degree to qualify for the job of speech language pathologist under the terms of the labor certification?

- Has the beneficiary established its continuing ability to pay the proffered wage from the priority date up to the present?

Is the Beneficiary Eligible for the Classification Sought?

As previously discussed, the ETA Form 9089 in this case is certified by the DOL. The DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. *See* Section 212(a)(5)(A)(i) of the Act, 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to the DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

A United States baccalaureate degree is generally found to require four years of education. *See Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977).¹ This decision involved a petition filed under 8 U.S.C. §1153(a)(3) of the Act, as amended in 1976. At that time, this section provided:

Visas shall next be made available . . . to qualified immigrants who are members of the professions

The Immigration Act of 1990 Act added section 203(b)(2)(A) to the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244, is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at 6786 (Oct. 26, 1990).

¹ In *Matter of Shah* the Regional Commissioner declined to consider a three-year Bachelor of Science degree from India as the equivalent of a United States baccalaureate degree because the degree did not require four years of study. *Id.* at 245.

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien “must have a bachelor’s degree” when considering equivalency for second preference (advanced degree professional) immigrant visas. We must assume that Congress was aware of the agency’s previous treatment of a “bachelor’s degree” under the Act when the new classification was enacted and did not intend to alter the agency’s interpretation of that term. See *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). See also 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor’s degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the INS responded to criticism that the regulation required an alien to have a bachelor’s degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor’s degree:

The Act states that, in order to qualify under the second classification, alien members of the professions must hold “advanced degrees or their equivalent.” As the legislative history . . . indicates, the equivalent of an advanced degree is “a bachelor’s degree with at least five years progressive experience in the professions.” Because neither the Act nor its legislative history indicates that bachelor’s or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor’s degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree (plus five years of progressive experience in the specialty). More specifically, a three-year bachelor’s degree will not be considered to be the “foreign equivalent degree” to a United States baccalaureate degree. See *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary’s credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the “equivalent” of a bachelor’s degree rather than a “foreign equivalent degree.”² In order to have experience and education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is

² Compare 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the “equivalence to completion of a college degree” as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification sought in this matter do not contain similar language.

the "foreign equivalent degree" to a United States baccalaureate degree (plus five years of progressive experience in the specialty). See 8 C.F.R. § 204.5(k)(2).

The degree must also be from a college or university. The regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree" (plus evidence of five years of progressive experience in the specialty). For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." The AAO cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. See *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F. 3d 28, 31 (3rd Cir. 1995) *per APWU v. Potter*, 343 F.3d 619, 626 (2nd Cir. Sep 15, 2003) (the basic tenet of statutory construction, to give effect to all provisions, is equally applicable to regulatory construction). Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a "baccalaureate means a bachelor's degree received *from a college or university*, or an equivalent degree." (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991).³

The documentation of record shows that the beneficiary earned the following educational credentials in India:

- [REDACTED]
- [REDACTED]

In its response to the AAO's NOID/RFE, the petitioner reiterates its previous contention that the beneficiary's Indian education is equivalent to a U.S. master's degree in the field. As evidence thereof, the petitioner cites the beneficiary's licensure by the [REDACTED] on April 15, 2009, which was predicated on her fulfillment of state requirements that include possession of "at least a master's degree in speech-language pathology or audiology from an educational institution approved by the board or qualifications deemed equivalent by the board." California's Business and Professions Code, Section 2532.2(a). The regulatory language quoted above, however, indicates that a master's degree is not an absolute requirement for licensure by the [REDACTED]. The California state regulations provide that "qualifications deemed equivalent by the [REDACTED] could also suffice, without further specification. It seems entirely possible that educational coursework amounting to less than a

³ Cf. 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of "an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, school or other institution of learning relating to the area of exceptional ability").

master's degree in combination with working experience in speech language pathology or audiology could be "deemed equivalent" by the [REDACTED] to a master's degree in the field. In this case, the record indicates that the beneficiary had several years of post-education experience as a speech therapist and audiologist before she was licensed by the [REDACTED]. Accordingly, the AAO does not agree with the petitioner's claim that the beneficiary's licensure in the State of California necessarily means that the [REDACTED] accepted her master's degree from India, standing alone, as equivalent to a U.S. master's degree.

Even if the AAO did agree with the petitioner's claim, it would not be dispositive in this proceeding because a ruling by a state entity is not binding on the AAO in its interpretation of a federal statute or regulation. The AAO is bound by the Act, agency regulations, precedent decisions of the agency, and published decisions from the federal circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F.Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd*, 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated). Even internal memoranda of U.S. Citizenship and Immigration Services (USCIS) do not establish judicially enforceable rights. *See Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000) (An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely.") Therefore, the beneficiary's licensure by the State of California has no bearing on the AAO's determination, in the context of this immigrant visa petition, of whether the beneficiary's foreign education is equivalent to a U.S. master's degree.

The petitioner cites the beneficiary's certification on August 30, 2007 by the [REDACTED] a division of the Commission on Graduates of [REDACTED] as having "met all of the requirements of section 212(a)(5)(C) of the Immigration and Nationality Act, as specified in Title 8, Code of Federal Regulations section 212.15(f) for the Profession of: Speech-Language Pathologist." The statutory provision cited above provides that a health-care worker seeking to enter the United States must present a certificate from the [REDACTED] verifying, among other things, that his or her education "meet[s] all applicable statutory and regulatory requirements for entry into the United States under the classification specified in the application." Section 212(a)(5)(C)(i)(I) of the Act, 8 U.S.C. § 1182(a)(5)(C)(i)(I). The regulatory provision cited above provides that an organization authorized to issue health care certificates must verify, among other things, that the alien's education "meet[s] all applicable statutory and regulatory requirements for admission into the United States. **This verification is not binding on the DHS.**" (Emphasis added.) 8 C.F.R. § 212.15(f).

As the limitation in the regulation makes clear, the AAO, as part of the Department of Homeland Security, is not bound by any verification by the ICHP/CGFNS regarding an alien's educational credentials. Thus, even if the ICHP certificate stated that the beneficiary's Indian master's degree was equivalent to a U.S. master's degree, it would have no legal consequence for the AAO in its adjudication of the instant petition. In fact, the certificate does not indicate that the ICHP/CGFNS viewed the

beneficiary's master's degree from [REDACTED] as comparable to a U.S. master's degree. Compliance with the statutory and regulatory provisions cited in the certificate does not require an alien to have a master's degree (U.S. or foreign equivalent), since classification as an "advanced degree professional" can be met with a bachelor's degree (U.S. or foreign equivalent) and five years of progressive experience in the specialty. While this combination of education and experience is considered equivalent to a master's degree under the regulatory definition of "advanced degree professional" in 8 C.F.R. § 204.5(k)(2), it does not comport with the labor certification in this case, which requires a master's degree without any experience component.

The petitioner has submitted an evaluation of the beneficiary's academic credentials by [REDACTED] dated March 8, 2007. After stating that the beneficiary's Bachelor of Science from [REDACTED] is equivalent to three years of undergraduate study in the United States and her Master of Science from [REDACTED] is equivalent to a U.S. bachelor's degree, ECE inexplicably concludes that the beneficiary's Indian degrees are equivalent to a U.S. bachelor's degree and a U.S. master's degree, respectively. ECE provides no explanation for this leap of logic. It simply stated its conclusion without analysis. Moreover, the ECE ignores the fact that U.S. baccalaureate degrees are generally four-year programs. *See Matter of Shah* at 244. ECE offers no rationale for evaluating the beneficiary's three-year bachelor's degree in India as comparable to a four-year bachelor's degree from a U.S. college or university. This omission undermines the foundation of the ECE's conclusion that the beneficiary's two-year master's degree is equivalent to a U.S. master's degree, because the essential building block – a U.S.-equivalent bachelor's degree – is missing.⁴

Evaluations of a person's foreign education by credentials evaluation organizations are utilized by USCIS as advisory opinions only. Where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept it or may give it less weight. *See Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988); *see also Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988). For the reasons discussed above, the AAO determines that the ECE's evaluation has little probative value. It is not persuasive evidence that the beneficiary's Indian credentials – the three-year bachelor's degree and the two-year master's degree – are comparable to a U.S. bachelor's degree and a U.S. master's degree, respectively.

As previously mentioned, the AAO has consulted the database (EDGE) created by AACRAO as a resource to evaluate the U.S. equivalency of foreign degrees. According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries." <http://www.aacrao.org/About-AACRAO.aspx>. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials."

⁴ The same substantive shortcoming applies to the International Education Research Foundation, Inc.'s Country Index for India, which asserts – without analysis – that a Master of Science degree that culminates more than four years of post-secondary study is equivalent to a U.S. master's degree.

<http://edge.aacrao.org/info.php>. Authors for EDGE are not merely expressing their personal opinions. Rather, they must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials.⁵ If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.⁶

EDGE states that a Bachelor of Science degree in India is awarded upon completion of two to three years of tertiary study beyond the Higher Secondary Certificate (comparable to a U.S. high school diploma), with the great majority being awarded after three years of tertiary study. The Indian degree is comparable to study at a U.S. college or university for the same number of years. According to EDGE, therefore, the beneficiary's three-year bachelor's degree from [REDACTED] is most likely comparable to three years of study at a U.S. college or university. EDGE also states that a Master of Science degree in India is awarded upon completion of two years of study beyond the three-year bachelor's degree, and is comparable to a bachelor's degree in the United States. Therefore, the beneficiary's two-year master's degree from [REDACTED] is most likely comparable to a bachelor's degree from a U.S. college or university, not a master's degree as claimed by the petitioner.

The petitioner challenges the AAO's utilization of AACRAO's EDGE as a resource, characterizing it as an inappropriate preferential endorsement of its education evaluation service over other credential evaluation services. The AAO does not agree. In reviewing this petition, the AAO has not relied on an evaluation by AACRAO of the beneficiary's specific educational credentials. Rather, it has utilized information from AACRAO's database – EDGE – that has been vetted by a panel of experts and has general applicability to all bachelor of science and master of science degrees in India. The evaluation from ECE submitted by the petitioner, on the other hand, focuses exclusively on the beneficiary's degrees. As previously discussed, it is lacking in analysis and internally inconsistent,

⁵ See *An Author's Guide to Creating AACRAO International Publications* available at http://www.aacrao.org/publications/guide_to_creating_international_publications.pdf.

⁶ In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that the AAO provided a rational explanation for its reliance on information provided by AACRAO to support its decision. In *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), the court found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were only comparable to a U.S. bachelor's degree. In *Sunshine Rehab Services, Inc.* 2010 WL 3325442 (E.D.Mich. August 20, 2010), the court upheld a USCIS determination that the alien's three-year bachelor's degree was not a foreign equivalent degree to a U.S. bachelor's degree. Specifically, the court concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. The court also noted that the labor certification itself required a degree and did not allow for the combination of education and experience.

since its conclusion as to the U.S. equivalency of the beneficiary's two Indian degrees conflicts with its equivalency evaluation of each individual degree in the body of the report. The AAO considers EDGE to be a more reliable resource than ECE in this instance.

The petitioner asserts that some U.S. colleges and universities have initiated three-year bachelor's degree programs, and that some U.S. universities recognize certain three-year bachelor's degrees from India as a sufficient qualification for entry into a U.S. master's degree program. While assorted documentation submitted by the petitioner corroborates these claims generally, the information therein is too vague and anecdotal to draw any firm conclusions that favor the petitioner in this proceeding. For example, the requirements a student must fulfill for admission into a three-year bachelor's degree program in the United States (such as advanced courses in high school and grade point average) may vary among U.S. colleges and universities. Similarly, U.S. universities considering three-year bachelor's degree holders for admission into advanced degree programs may require such applicants to have a higher grade point average, class standing, and/or advanced course content in their undergraduate studies. It is not clear from the beneficiary's academic record in India that she would satisfy such criteria. In any event, the fact remains that the standard length of a bachelor's degree program in the United States is four academic years.

The petitioner has submitted an article by [REDACTED] ("*Three-Year Indian Undergraduate Degrees: Recommendations for Graduate Admission Consideration*") which advocates that a three-year Indian bachelor's degree followed by a two-year master's degree should be considered comparable to a U.S. master's degree because the rigorous standards the student must meet in the bachelor's degree program to gain admission to a master's degree program in India raises the overall level of the five-years of education to master's degree equivalency in the United States. The AAO is not persuaded that a "high octane" bachelor's degree program of three academic years in India is equivalent to a standard four-year bachelor's degree in the United States. Even if the AAO were persuaded by this rationale, the petitioner has not demonstrated that the beneficiary's particular bachelor's degree program at [REDACTED] met the content and achievement criteria discussed by [REDACTED].

The petitioner asserts that the United States is bound by UNESCO (United Nations Educational Scientific and Cultural Organization) conventions regarding international recognition of foreign educational credentials, in particular the Lisbon Convention of July 1, 2003. UNESCO has six

⁷ The same applies to the website excerpt of World Education Services (WES) submitted by the petitioner: <http://www.wes.org/students/indiapolicy.asp> (May 22, 2012). WES – which claims to be "the largest credential evaluation organization with over thirty years of experience" – states that it "recognizes selected three-year Bachelor's degrees from India as equivalent to a U.S. Bachelor's degree, *when the following conditions are met*: (a) The degrees have been earned in Division I and II, AND (b) The awarding institutions have been accredited by India's National Assessment and Accreditation Council (NAAC) with a grade of "A" or better. (Emphasis in the original). The petitioner has not demonstrated that the beneficiary's baccalaureate education at [REDACTED] met the conditions enumerated by WES.

regional conventions on the recognition of qualifications, and one interregional convention. A UNESCO convention on the recognition of qualifications is a legal agreement between countries agreeing to recognize academic qualifications issued by other countries that have ratified the same agreement. While India has ratified one UNESCO convention on the recognition of qualifications (Asia and the Pacific), the United States has ratified none of the UNESCO conventions on the recognition of qualifications. In an effort to move toward a single universal convention, the UNESCO General Conference adopted a Recommendation on the Recognition of Studies and Qualifications in Higher Education in 1993. The United States was not a member of UNESCO between 1984 and 2002, and the Recommendation on the Recognition of Studies and Qualifications in Higher Education is not a binding legal agreement to recognize academic qualifications between UNESCO members. See <http://www.unesco.org> (accessed April 29, 2012). Thus, the petitioner's claim that the United States is bound by a UNESCO convention on the recognition of foreign degrees has no merit.

According to the petitioner, the United States has signed and ratified the Lisbon Convention, which entered into force in the United States on July 1, 2003. The petitioner is mistaken. While the United States did sign the Convention on November 4, 1997, the Convention has never been ratified by the United States and it has not entered into force in the United States. See applicable website: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=165&CM-8&CL=ENG> (accessed May 6, 2012). Moreover, the Convention does not bind the signatory states to any particular outcomes in assessing the equivalency of foreign education. Rather, it commits the signatories to certain standards and procedures in evaluating foreign educational credentials, while reserving the ultimate decision-making power in the signatory states. See http://portal.unesco.org/en/ev.php-URL_ID=13522&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed May 6, 2012).

For all of the reasons discussed in this decision, the AAO determines that the petitioner has failed to establish that the beneficiary has a foreign equivalent degree to a U.S. master's degree in audiology and speech language pathology, as required by the labor certification. In accord with EDGE's credential advice, the AAO concludes that the beneficiary's education is more likely than not comparable to a U.S. bachelor's degree in audiology and speech language pathology.

As an alternative basis for relief, the petitioner asserts that the beneficiary is eligible for classification as an advanced degree professional based on her foreign equivalent degree to a U.S. bachelor's degree plus five years of progressive experience in the specialty, which meets the definition of "advanced degree" in 8 C.F.R. § 204.5(k)(2). The beneficiary is not eligible for classification on this basis, however, because the labor certification co-signed by her and the petitioner's COO (chief operating officer) specifically requires a master's degree or a foreign educational equivalent (Part H, lines 4 and 9, of ETA Form 9089), and does not allow for any alternate combination of education and experience (Part H, line 8, of ETA Form 9089). To be eligible for a given classification, the beneficiary must meet all the requirements set forth on the labor certification. See *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977).

Thus, the beneficiary is not eligible for classification as an advanced degree professional under section 203(b)(2) of the Act because she lacks the requisite educational degree. Accordingly, the petition cannot be approved.

2. Is the Beneficiary Qualified for the Job Offered?

To be eligible for approval as an advanced degree professional, the beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House* at 158.

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference [visa category] status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: "The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu*, 736 F. 2d at 1309.

The key to determining the job qualifications is found in ETA Form 9089, Part H. This part of the application describes the terms and conditions of the job offered. It is important that the application be read as a whole.

When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job

requirements” in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS’s interpretation of the job’s requirements, as stated on the labor certification, must involve reading and applying *the plain language* of the alien employment certification application form. *Id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that the DOL has formally issued or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

The petitioner specified the following educational, training, and experience requirements for the speech language pathologist:

- The minimum educational requirement is a master’s degree or a “foreign educational equivalent” in audiology and speech language pathology. (Part H, line 4, 4-B, and 9.)
- No training or experience is required. (Part H, lines 5 and 6.)
- No alternate combination of education and experience is acceptable. (Part H, line 8.)
- A license in speech language pathology is required. (Part H, box 14.)

While the beneficiary has the requisite license from the State of California, she does not have the requisite educational degree because her master's degree from India is not equivalent to a U.S. master's degree in the field. Therefore, the beneficiary does not satisfy the minimum educational requirement of the labor certification to qualify for the proffered position. For this reason as well, the petition cannot be approved.

Has the Petitioner established its Ability to Pay the Proffered Wage?

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date onward. *See* 8 C.F.R. § 204.5(d). The priority date is the date the labor certification application

was accepted for processing by the DOL. *Id.*⁸ As previously discussed, the priority date in this case is March 8, 2010. The “offered wage” of the subject position, in Part G of the ETA Form 9089, is [REDACTED] per hour, which amounts to [REDACTED] per year (based on a work year of 2,080 hours).

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of the ETA Form 9089 establishes a priority date for any immigrant petition later based on that document, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner’s ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary’s proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

While the petitioner has established its ability to pay the proffered wage in the year 2010, it has not done so for the time thereafter. In the NOID/RFE issued on April 26, 2012, the AAO requested the petitioner to submit copies of its federal income tax return or audited financial statement for 2011, as well as the Form W-2, Wage and Tax Statement, issued to the beneficiary for 2011. None of this documentation was submitted with the petitioner's response to the NOID/RFE. "The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition." 8 C.F.R. § 103.2(b)(14).

Thus, the petitioner has not established its continuing ability to pay the proffered wage from the priority date (March 8, 2010) up to the present. For this additional reason, the petition cannot be approved.

Conclusion

The petition is deniable on three grounds:

1. The beneficiary does not have the requisite educational degree – specifically, a U.S. master’s degree or a “foreign equivalent degree” – to be eligible for classification as an advanced degree professional under section 203(b)(2) of the Act.
2. The beneficiary does not qualify for the proffered position of speech language pathologist under the terms of the labor certification because she does not have the requisite educational degree – specifically, a U.S. master’s degree or a “foreign educational equivalent.”

⁸ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad.

3. The petitioner has not established its continuing ability to pay the proffered wage from the priority date (March 8, 2010) up to the present.

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. Accordingly, the Director's decision recommending the approval of the petition will be withdrawn. The petition will be denied

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The Director's decision of January 12, 2012, recommending approval of the petition and certifying it for review to the AAO, is withdrawn. The petition is denied.